fendant to rely upon a counter claim against the payee, in defence of an overdue note or bill, and even the giving of notice to the payee of such purpose, on the part of the maker, will not preclude the payee from assigning the note or bill, in order to evade such set-off, unless he has, either expressly or by legal implication, assented to such set-off. This was so held in *Oulds* v. *Harrison*, 10 Exch. 572.

The Massachusetts cases, under the equity of their statute, allow counter claims on the part of the maker in such cases to be pleaded in set-off against the endorsee, provided they existed before the actual transfer of the note or bill: *Baxter* v. *Little*, 6 Met. 7; *Sargent* v. *Southgate*, 5 Pick. 312. And these cases have been recognised in some of the other states, as appears in the opinion in the principal case. But, in the main, we think the English rule, as before stated, is adopted in the American states. Equity might possibly interfere where the assignee knew of the existence of a claim in set-off at the time of his purchase and also of the insolvency of the payee, and that the effect of the transfer must be to defraud the maker.

I. F. R.

Supreme Judicial Court of Vermont.

ROONEY, GUARDIAN OF RYAN, v. SOULE.

The orator alleged in his bill that R., his ward, was the owner of a farm in F., and had a homestead therein, and that he was adjudged a bankrupt, and the defendant appointed his assignee, and that said homestead was decreed to R. by the Court of Bankruptcy; that R. absconded, and the orator was appointed his guardian; that the defendant thereafterwards obtained judgment by default against R., before a justice of the peace, without the service of process, notice, or recognisance for review, and levied his execution upon, and set off, said homestead; that it was the duty of the orator, as such guardian, to sell said homestead for the support of R.'s family, but that said levy and set-off hindered and impeded his selling the same, and constituted a cloud upon the title thereof; and prayed that said cloud be removed. The answer averred that the Court of Bankruptcy adjudged that R. had a *homestead interest* in said farm; that the defendant's claim upon which said judgment was founded, was anterior to the acquisition of said homestead, and that said homestead was not exempt from said levy and set-off. The case was heard on bill and answer. *Held*, that the case was not one for the interposition of a court of equity.

APPEAL from the Court of Chancery. The case sufficiently appears from the opinion, except that the bill alleged that it was necessary for the orator, in the due performance of his duty as guardian, to sell his ward's said homestead interest for the support of the family of his said ward, and that the levy and set-off on the defendant's execution, and the record thereof in the town-clerk's office, constituted a cloud upon the title of said homestead, and greatly hindered and impeded the orator in selling the same.

The court, ROYCE, Chancellor, dismissed the bill. Appeal by the orator.

Benton & Irish, for the orator.—The bill presents several grounds of equity jurisdiction. It claims that the judgment was irregularly obtained. It is true this would have been ground for *audita querela*, which is a statutory remedy, like the special petition for a new trial on the ground of fraud, accident or mistake. But it has been held that such remedies are cumulative, and do not extinguish the remedies previously existing: *Alexander* v. *Abbott*, 21 Vt. 476. In the early history of equity jurisprudence, and before the day of the writ of *audita querela*, such irregularities were a well recognised and very common ground of equity jurisdiction. But, be this as it may, the case shows other and very clear grounds of equity jurisdiction. The bill shows that the orator, as guardian, is obliged to sell this property for the support of the children of his ward, and that he cannot make the sale with this levy outstanding. This levy, then, constitutes a cloud upon the orator's title, which works him an injury. On this ground, he has a well recognised ground of relief in chancery to remove that cloud: *Hodges* v. *Griggs et al.*, 21 Vt. 280, 282; *Eldridge* v. *Smith et al.*, 24 Vt. 484; Hilliard Injunct. 304, 550; *England* v. *Lewis*, 25 Cal. 357. Another ground might be, to prevent multiplicity of suits.

F. M. McIntyre, for the defendant.

The opinion of the court was delivered by

REDFIELD, J.—The orator alleges in his bill that his ward, William H. Ryan, was the owner of a farm in Fairfield, and had a homestead interest therein; that he was adjudged a bankrupt by the District Court of the United States for Vermont; that the defendant was duly appointed assignee of his assets, and that a homestead was decreed to said Ryan by said court; that Ryan absconded, and that the orator was appointed his guardian; after which the defendant obtained judgment without service of process, or notice or recognisance for review, before a justice of the peace, against said Ryan, and levied his execution and set off said homestead. The answer avers that the District Court adjudged that Ryan had a *homestead interest* in said premises; that the defendant's claim, upon which he obtained said judgment, was anterior to the acquisition of said homestead; that said homestead was not exempt

from his execution and levy, and that his judgment was regular and valid. The case was submitted on bill and answer.

I. This is a bill *quia timet*, to remove a *cloud* from the plaintiff's title to a parcel of land. *Another* cloud, somewhat dense, seems now to have enveloped the title, by a decree of foreclosure which has become absolute against both parties. And as this is averred and relied upon in the answer, it should operate, at least, as a *disclaimer* of title on the part of the defendant. It is doubtful, upon the averments in the bill and answer, whether Ryan had an absolute and entire homestead. Homesteads, under our statute, may exist *sub modo*, subject to certain debts, or mortgage-liens. Whether it is not the province and duty of the bankrupt court to marshal the assets of the bankrupt, and determine priorities of right and lien, or what *has* been done as to this property by that court, is not made very clear in proof or argument. But we think this not a case for the interposition of a court of equity.

There is no fund locked up awaiting the determination of title, as in *Hodges* v. *Griggs*, 21 Vt. 280, and the court, in that case, directed the parties to implead at law. There is no averment that makes this an exception to the common case where one party claims to be the true owner of land, and alleges that another claims it without valid title. The jurisdiction of courts of law and of equity is not concurrent in this class of cases, leaving a party his *election* in which forum he will have his rights determined. But courts of equity will, in their *discretion*, in *exceptional cases*, interpose to prevent fraud and wrong. Where one holds the apparent title, but it is invalid in the hands of those who have notice of the equities of another, and there is reason to apprehend he will convey it to an innocent purchaser, a court of equity will interfere to restrain a party from such threatened act; for otherwise it would work a fraud to an innocent party. But when the title asserted is all of *record*, and its infirmities can be exposed at all times, and against all persons, a court of equity will not interfere, but leave the party to his remedy at law—the forum provided for settling such issues of fact. Such is the general current of the authorities: *Van Doren* v. *Mayor of New York*, 9 Paige 388; *Mallory* v. *Dougherty*, 16 Wis. 267; *Munson* v. *Munson*, 28 Conn. 582; 1 Story's Eq. Juris. § 700 a, and note; *Woodman* v. *Salstonstall*, 7 Cush. 181; *Blackmore* v. *Von Vleet*, 11 Mich. 252.

In *Wing, Adm'r* v. *Hall & Darling*, 44 Vt. 118, WHEELER,

J., says: "The relief in such cases is granted, not as a matter of right that the party seeking it has, but as a matter of *discretion* that the court may or may not exercise, as appears fit." That discretion is not arbitrary, but *judicial*, and is to be exercised in exceptional cases where the remedy at law is inadequate, and delay dangerous; or some other ingredient is shown requiring the effectual powers of equity jurisdiction to prevent fraud and injustice. If the defendant's judgment, execution and levy are void, their infirmity is apparent upon the records, which are fixed, and will remain; and when the defendant attempts to oust the orator by asserting the validity of his judgment and set-off, there would seem little danger, and the orator could readily show their invalidity.

But if a party who distrusts his own title and fears that of another, may, at his election, and as an experiment, drag into a court of equity all persons who may have some claim or title to the premises, and thus occupy the court in canvassing titles and determining rights that were never asserted, it would be perverting a very salutary rule of equity law to needless and mischievous ends. The inquiry into title to lands, has a special fitness to trial by jury; and we think that litigation would be abridged, and public justice subserved, by adhering to a just and salutary rule of law, rather than perverting it to new experiments.

The decree of the Court of Chancery dismissing the orator's bill, is affirmed, and the cause is remanded.

The foregoing opinion is upon an important practical question in equity law, and the opinion of the court seems to be strictly in accordance with established principles.

The limits of the jurisdiction of courts of equity upon the subject of the cancellation of outstanding contracts, and the particular instances in which the jurisdiction might be invoked, seems to have been, at an early day, for a long time, in more or less doubt. But the jurisdiction is now fully established. The case of *Hamilton* v. *Cummings*, 1 Johns. Ch. 517, reviews all the cases, to the date of the decision, as was the practice of Chancellor KENT, with the view of defining the exact boundaries of the jurisdiction, which the learned Chancellor declared to be most unquestionable, in all cases of outstanding contracts, which might, in any way, operate as a cloud upon the title of other property owners, whether such contracts were void at law or not, and whether the defect in the contract appeared upon the face of it, or not. The words of that eminent judge will afford the best commentary upon the law we could present. He said:

"While I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications, when the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle, that the exercise of this power

is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference of this court will still depend on a question of expediency, and not on a question of jurisdiction. It may, sometimes, become essential to the perfect and tranquil enjoyment of private right, that this most important branch of equity power should be exercised in the one case as well as in the other, and it may be here observed, that in the case of *Law* v. *Law*, Cases t. Talbot 140, the whole consideration was spread out upon the bonds, and yet he [the Chancellor] cancelled the bond without sending the parties to law."

The doctrine has been maintained in most of the American states, and is thoroughly well established upon the basis of *Hamilton* v. *Cummings*, *supra*. Thus in Massachusetts it is recognised in *Pierce* v. *Lamson*, 8 Allen 60; *Martin* v. *Graves*, Id. 601; in both of which cases the instruments set aside, had been fraudulently obtained, and might therefore have been defended at law. *Clouston* v. *Shearer*, 99 Mass. 209, was the case of an outstanding mortgage, and *Sullivan* v. *Finnigan*, 101 Mass. 447, was the case of a forged deed, in both of which the defence was equally available at law. The question is somewhat discussed by WOODRUFF, J., in *Williams* v. *Fitzhugh*, 37 N. Y. 444, in regard to contracts void for usury: *Cole* v. *Savage*, 10 Paige 583. The question is very fully presented in *Tucker* v. *Kenniston*, 47 N. H. 267, and the cases extensively reviewed by the late Chief Justice BELLOWS.

Mr. Justice STORY, in his Equity Jurisprudence, defines the jurisdiction much in the same terms as before stated by Chancellor KENT, Vol. I. p. 700, §§ 439, 694, 700, 705. In some of the cases the courts of equity have interfered in advance to prevent the defendant from creating a cloud upon title: *Tucker* v. *Keniston*, *supra*; *Pellett* v. *Shepherd*, 5 Paige 493. The jurisdiction is also recognised in *Lounsbury* v. *Purdy*, 18 N. Y. 515; *Dean* v. *Madison*, 9 Wis. 482; *Kimberly* v. *Fox*, 27 Conn. 307. So that there can remain no question of its being well established in all the equity courts of this country and in England.

The only question which can ever exist in any such case, after the leading facts are established, of the existence of a colorable cloud upon the plaintiff's title, will be, whether the particular circumstances demand the interference of a court of equity. It must be obvious to all, that the question, as suggested in the opinion, will have to be carefully weighed, in every such case—whether the case is an exceptional one, calling for the exercise of the power of a court of equity to prevent fraud and injustice, and where the remedy at law is likely to be delayed so long that there might be danger of the evidence being lost, or in some way irremediable wrong intervene. Unless there appears some very special and exceptional demand for the interference of a court of equity, it should be denied in all such cases. Any other rule would but invite the transfer of the trial of all cases affecting the title of land, from the courts of common law to those of equity; thus rendering the two jurisdictions concurrent in all such cases, which no court has ever maintained. I. F. R.